



FORM 11A

Rule 11.15(4)(a)

IN THE SUPREME COURT OF VICTORIA
AT MELBOURNE
COMMERCIAL COURT
GROUP PROCEEDINGS LIST

Case: S ECI 2020 04505

Filed on: 12/04/2022 02:23 PM

No. S ECI 2020 04505

BETWEEN

NICHOLAS JOHN GEHRKE

First Plaintiff

LESTER BUCH

Second Plaintiff

AND

NOUMI LIMITED (FORMERLY FREEDOM FOODS GROUP LIMITED) (ACN 002 814 235)

First Defendant

DELOITTE TOUCHE TOHMATSU (A FIRM)

Second Defendant

THIRD PARTY NOTICE

Date of document: 12 April 2022

Filed on behalf of: The Second Defendant

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To: The First Defendant

Noumi Limited (formerly Freedom Foods Group Limited) (ACN 002 814 235)

TAKE NOTICE that the plaintiff has brought this proceeding against the defendant for the claim set out in the writ and statement of claim served herewith.

AND TAKE NOTICE that the defendant disputes the plaintiff's claim on the grounds set out in the defendant's defence served herewith, and claims to be entitled to relief against you on the grounds set out in the statement of claim indorsed on this notice.

IF YOU INTEND TO DISPUTE the plaintiff's claim against the defendant, or the defendant's claim against you, YOU MUST GIVE NOTICE of your intention by filing an appearance within the proper time for appearance stated below.

YOU OR YOUR SOLICITOR may file the appearance. An appearance is filed by:

- (a) filing a "Notice of Appearance" in the Prothonotary's office, 436 Lonsdale Street, Melbourne, or, where the writ has been filed in the office of a Deputy Prothonotary, in the office of that Deputy Prothonotary; and
- (b) on the day you file the Notice, serving a copy, sealed by the Court, at the defendant's address for service, which is set out at the end of this notice.

IF YOU FAIL to file an appearance within the proper time you will be taken to admit the validity of any judgment against the defendant and your own liability to the defendant to the extent claimed in the statement of claim indorsed on this notice, and the defendant may OBTAIN JUDGMENT AGAINST YOU without further notice.

THE PROPER TIME TO FILE AN APPEARANCE is as follows—

- (a) where you are served with the notice in Victoria, within 10 days after service;
- (b) where you are served with the notice out of Victoria and in another part of Australia, within 21 days after service;
- (c) where you are served with the notice in Papua New Guinea, within 28 days after service;
- (d) where you are served with the notice in New Zealand under Part 2 of the Trans-Tasman Proceedings Act 2010 of the Commonwealth, within 30 working days (within the meaning of that Act) after service or, if a shorter or longer period has been fixed by the Court under section 13(1)(b) of that Act, the period so fixed;
- (e) in any other case, within 42 days after service of the notice

FILED: 12 April 2022

Prothonotary

STATEMENT OF CLAIM

NOTE:

1. A defined term used in this statement of claim has, unless otherwise indicated in this statement of claim or, if not indicated in this statement of claim, in the defence filed by the Second Defendant on 8 April 2022 (**Defence**) to the Consolidated Statement of Claim filed by the joint plaintiffs against the First Defendant and Second Defendant dated 16 December 2021 (**CSOC**), the same meaning as that assigned to it in the CSOC.

A. BACKGROUND MATTERS

A1. Parties

- 1 Deloitte are a partnership which conduct, and have at all relevant times conducted, business within Australia as accountants, auditors and advisors.
- 2 FNP:
 - (a) is and was at all relevant times incorporated pursuant to the Corporations Act and capable of being sued;
 - (b) is and was at all relevant times a person within the meaning of ss 728 and 1041H of the Corporations Act;
 - (c) is and was at all relevant times a person within the meaning of s 12DA of the ASIC Act; and
 - (d) is and was at all relevant times a person within the meaning of s 18 of the ACL.

A2. The Plaintiffs' claims against FNP

- 3 The Plaintiffs (on behalf of themselves and Group Members) have made claims against FNP in this proceeding by a Consolidated Writ dated 16 December 2021 and the CSOC.

A3. The Plaintiffs' claims against Deloitte

- 4 The Plaintiffs (on behalf of themselves and Group Members) have also made claims against Deloitte in this proceeding by the Consolidated Writ and the CSOC, by which they allege that:

- (a) by making each of the alleged Deloitte Representations, Deloitte engaged in conduct in contravention of ss 1041H and 1041E of the Corporations Act, s 12DA of the ASIC Act and s 18 of the ACL; and
- (b) by reason of those alleged contraventions, the Plaintiffs and Group Members have suffered loss and damage.

A4. Basis of Deloitte’s claim against FNP

5 Deloitte:

- (a) have filed a defence to the CSOC dated 8 April 2022, a copy of which is served with this statement of claim on third party notice; and
- (b) in their Defence, deny that the Plaintiffs and Group Members have any cause of action against Deloitte, and deny that Deloitte has any liability to the Plaintiffs or any Group Members for damages or any other relief sought against them in the CSOC.

6 If Deloitte are liable to the Plaintiffs and/or the Group Members as alleged in the CSOC (which is denied) and if the Plaintiffs and/or the Group Members have suffered loss and damage (**Plaintiffs’ and Group Members’ Loss and Damage**) by reason of Deloitte’s alleged contraventions (which is also denied), then Deloitte make the following claims against FNP expressly on the above basis and solely for the purpose of this claim on third party notice.

B. FNP’S CONTRAVENTIONS AS ALLEGED BY THE PLAINTIFFS

7 For the purpose of this claim on third party notice, and for that purpose only, Deloitte repeats the allegations made against FNP in sections A to G and I and J of the CSOC, including paragraphs 75 to 87 and paragraphs 96 to 98 of the CSOC which allege contraventions by FNP (**FNP’s Contraventions**).

C. FNP’S COMPLIANCE REQUIREMENTS AND LEGAL DUTIES

8 At all material times, FNP was required:

- (a) pursuant to s 286 of the Corporations Act, to keep written financial records that:
 - i. correctly record and explain its transactions and financial position and performance; and
 - ii. enable true and fair financial statements to be prepared and audited;

- (b) pursuant to s 292 of the Corporations Act, to prepare a financial report and a directors' report for each financial year;
- (c) pursuant to s 295 of the Corporations Act, to ensure that its financial report for a financial year contains:
 - i. the financial statements for the year;
 - ii. the notes to the financial statements; and
 - iii. the directors' declaration about the statements and notes;
- (d) pursuant to s 296 of the Corporations Act, to ensure that its financial report for a financial year complies with the applicable accounting standards; and
- (e) pursuant to s 297 of the Corporations Act, to ensure that its financial statements and notes for a financial year give a true and fair view of the financial position and performance of FNP;
- (f) pursuant to s 302 of the Corporations Act, to prepare a financial report and directors' report for each half-year;
- (g) pursuant to s 303 of the Corporations Act, to ensure that its financial report for a half-year contains:
 - i. the financial statements for the half-year;
 - ii. the notes to the financial statements; and
 - iii. the directors' declaration about the statements and notes;
- (h) pursuant to s 304 of the Corporations Act, to ensure that its financial report for a half-year complies with the accounting standards and any further requirements in the *Corporations Regulations 2001* (Cth) (**Corporations Regulations**); and
- (i) pursuant to s 305 of the Corporations Act, to ensure that its financial statements and notes for a half-year give a true and fair view of the financial position and performance of FNP.

D. DELOITTE'S RETAINERS WITH FNP

9. On:

- (a) 6 February 2014, Deloitte were retained by FNP to audit the FY2014 Full-Year Financial Report (**FY14 Deloitte Retainer**);

Particulars

*The terms of the FY2014 Deloitte Retainer were set out in a letter dated 6 February 2014 from Deloitte to Rory Macleod, Managing Director of FNP which provided a link to the Deloitte Standard Terms and Conditions effective from 21 March 2013 (**Deloitte Standard Terms and Conditions**).*

- (b) 17 December 2014, Deloitte were retained by FNP to audit the FY2015 Full-Year Financial Report and to review FNP's 1H2015 Half-Year Financial Report (**FY15 Deloitte Retainer**);

Particulars

The terms of the FY15 Deloitte Retainer were set out in a letter dated 17 December 2014 from Deloitte to Rory Macleod, Managing Director of FNP which enclosed the Deloitte Standard Terms and Conditions.

- (c) 3 December 2015, Deloitte were retained by FNP to audit the FY2016 Full-Year Financial Report and to review FNP's 1H2016 Half-Year Financial Report (**FY16 Deloitte Retainer**);

Particulars

The terms of the FY16 Deloitte Retainer were set out in a letter dated 3 December 2015 from Deloitte to Rory Macleod, Managing Director of FNP which enclosed the Deloitte Standard Terms and Conditions.

- (d) 13 December 2016, Deloitte were retained by FNP to audit the FY2017 Full-Year Financial Report and to review FNP's 1H2017 Half-Year Financial Report (**FY17 Deloitte Retainer**);

Particulars

The terms of the FY17 Deloitte Retainer were set out in a letter dated 13 December 2016 from Deloitte to Rory Macleod, Managing Director of FNP which enclosed the Deloitte Standard Terms and Conditions.

- (e) 12 December 2017, Deloitte were retained by FNP to audit the FY2018 Full-Year Financial Report and to review FNP's 1H2018 Half-Year Financial Report (**FY18 Deloitte Retainer**);

Particulars

The terms of the FY18 Deloitte Retainer were set out in a letter dated 12 December 2017 from Deloitte to Rory Macleod, Managing Director of FNP which enclosed the Deloitte Standard Terms and Conditions.

- (f) 22 January 2019, Deloitte were retained by FNP to audit the FY2019 Full-Year Financial Report and to review FNP's 1H2019 Half-Year Financial Report (**FY19 Deloitte Retainer**); and

Particulars

The terms of the FY19 Deloitte Retainer were set out in a letter dated 22 January 2019 from Deloitte to Rory Macleod, Managing Director and CEO of FNP which enclosed the Deloitte Standard Terms and Conditions.

- (g) 19 February 2020, Deloitte were retained by FNP to review FNP's 1H2020 Half-Year Financial Report (**HY20 Deloitte Retainer**).

Particulars

The terms of the HY20 Deloitte Retainer were set out in a letter dated 19 February 2020 from Deloitte to Rory Macleod, Managing Director and CEO of FNP which enclosed the Deloitte Standard Terms and Conditions.

10. The FY14 Deloitte Retainer, FY15 Deloitte Retainer, the FY16 Deloitte Retainer, the FY17 Deloitte Retainer, the FY18 Deloitte Retainer, the FY19 Deloitte Retainer, and the HY20 Deloitte Retainer (together, the **Deloitte Retainers**) contained, relevantly, the following express terms:

- (a) Deloitte would undertake:
- i. audits of the Full-Year Financial Reports prepared by FNP with the objective of obtaining reasonable assurance about whether the financial reports as a whole were free from material misstatement, whether due to fraud or error, and express an opinion on whether the financial reports were prepared, in all material respects, in accordance with the applicable financial reporting framework; and
 - ii. reviews of the Half-Year Financial Reports prepared by FNP with the

objective of providing a basis for expressing a conclusion whether the auditor had become aware of any matter that made the auditor believe that the half-year reports were not prepared, in all material respects, in accordance with the Corporations Act and AASB 134;

- (b) At the conclusion of each audit and review, Deloitte would issue as relevant:
 - i. an Independent Auditor's report to the members of FNP; or
 - ii. an Independent Auditor's review report to the members of FNP;
- (c) Deloitte would request, and FNP was required to provide:
 - i. written confirmations from management, and where appropriate from the directors, concerning representations made to Deloitte in connection with the audits; and
 - ii. written representations from management, and where appropriate from the directors, concerning assertions made to Deloitte in connection with the reviews;
- (d) FNP's directors acknowledged and understood that they had the responsibility:
 - i. for the preparation of Full-Year Financial Reports and Half-Year Financial Reports that gave a true and fair view in accordance with Australian Accounting Standards and the Corporations Act;
 - ii. for such internal controls as the directors determined were necessary to enable the preparation of Full-Year Financial Reports and Half-Year Financial Reports that were free from material misstatement, whether due to fraud or error;
 - iii. to provide Deloitte with:
 - A. access to all information of which the directors and management were aware that was relevant to the preparation of the Full-Year Financial Reports and Half-Year Financial Reports such as records, documentation and other matters;
 - B. additional information that Deloitte may request from the directors and management for the purpose of each audit and review; and
 - C. unrestricted access to persons within FNP from whom Deloitte

determined it was necessary to obtain evidence;

- (e) FNP agreed to:
 - i. co-operate with Deloitte and provide Deloitte with all reasonable and necessary assistance so that the firm can provide the services under the retainer (cl 11.1 of the Deloitte Standard Terms and Conditions);
 - ii. be responsible for, among other things:
 - A. the performance of its representatives (cl 11.2(a) of the Deloitte Standard Terms and Conditions);
 - B. providing Deloitte with accurate and complete information and all information that was relevant to the services to be provided by Deloitte under the retainer (cl 11.2(e) of the Deloitte Standard Terms and Conditions);
 - C. updating the information where there had been a material change to that information, including telling Deloitte if any of FNP's circumstances changed during the course of the retainer (cl 11.2(f) of the Deloitte Standard Terms and Conditions);
- (f) FNP acknowledged that:
 - i. Deloitte's ability to provide the services under the retainer depended on FNP meeting its responsibilities and instructing Deloitte in a timely and effective manner (cl 11.3(b) of the Deloitte Standard Terms and Conditions);
 - ii. Deloitte was entitled to and would rely on information provided by FNP (cl 11.3(c) of the Deloitte Standard Terms and Conditions); and
 - iii. Deloitte would not be liable for any default that arises because FNP did not fulfil its obligations (cl 11.3(d) of the Deloitte Standard Terms and Conditions).
- (g) Deloitte would not be liable for any Loss (defined to mean any losses, liabilities, claims, damages, costs or expenses, judgments or orders however caused or arising as a result of the services or the retainer) arising as a result of Deloitte relying on any false, misleading or incomplete information provided by FNP (cll 13.4 and 28 of the Deloitte Standard Terms and Conditions).

11. Further to the express term pleaded at paragraph 10(d)(iii) above, pursuant to the FY17 Deloitte Retainer, the FY18 Deloitte Retainer, the FY19 Deloitte Retainer, and the HY20 Deloitte Retainer, FNP's directors expressly acknowledged and understood that they had the responsibility (in addition to the matters already pleaded) for ensuring that:
- (a) Deloitte was informed of all documents that the directors expect to issue that may comprise other information; and

Particulars

The term was set out in paragraph (e) on page 4 of each of the FY17 Deloitte Retainer, FY18 Deloitte Retainer, FY19 Deloitte Retainer and HY20 Deloitte Retainer, beneath the heading "The responsibilities of the directors and identification of the applicable reporting framework".

- (b) the Full-Year Financial Reports and Half-Year Financial Reports and any other information Deloitte may obtain was provided on a timely basis, and would be consistent with one another, and the other information would not contain any material misstatements.

Particulars

The term was set out in paragraph (f) on page 4 of each of the FY17 Deloitte Retainer, FY18 Deloitte Retainer, FY19 Deloitte Retainer and HY20 Deloitte Retainer, beneath the heading "The responsibilities of the directors and identification of the applicable reporting framework".

12. The Deloitte Retainers contained an implied term that FNP would exercise reasonable care, skill and diligence in:

- (a) preparing Full-Year Financial Reports and Half-Year Financial Reports which gave a true and fair view of FNP's financial position and performance in accordance with the Corporations Act; and
- (b) providing Deloitte with access to all information of which the directors and management were aware that was relevant to the preparation of the Full-Year Financial Reports and Half-Year Financial Reports the subject of the retainers such as records, documentation and other matters.

Particulars

The term is to be implied:

- (a) by reason of the matters set out in paragraph 8; and*
(b) because the term:

- i. *is reasonable and equitable;*
- ii. *is necessary to give business efficacy to the contract;*
- iii. *so obvious that "it goes without saying";*
- iv. *is capable of clear expression; and*
- v. *does not contradict any express term of the contract.*

E. FNP'S REPRESENTATIONS

13. For the purposes of this claim on third party notice, and that purpose only, Deloitte repeats the representations pleaded at paragraph 46 of the CSOC save that those representations were made by FNP to Deloitte before Deloitte finalised and issued to FNP the relevant Deloitte Full-Year Audit Reports and Deloitte Half-Year Review Reports and before FNP's Half-Year Financial Reports and Full-Year Financial Reports (as the case may be) were published to the market (**FNP Accounts Representations**).

Particulars

The FNP Accounts Representations were made to Deloitte in respect of each of FNP's Full-Year Financial Reports and Half-Year Financial Reports through:

- (i) *the provision by FNP to Deloitte of FNP's Full-Year Financial Reports and Half-Year Financial Reports, including the directors' declarations contained therein:*
 - (A) *for the purposes of Deloitte finalising its audit or review of those reports and issuing its audit opinion or review opinion; and*
 - (B) *in the form or substantially in the form in which those Full-Year Financial Reports and Half-Year Financial Reports were subsequently published to the ASX;*
- (ii) *the provision by FNP to Deloitte of FNP's directors' reports for each of the relevant years and half-years;*
- (iii) *in relation to each of the Full-Year Financial Reports, FNP's CEO or Chief Financial Officer giving to FNP's directors a declaration in writing made pursuant to s 295A of the Corporations Act; and*
- (iv) *the conduct pleaded in paragraphs 15 to 22 below.*

14. Alternatively, if and to the extent that one or more of the FNP Accounts Representations was a representation of opinion only, then FNP impliedly represented that it had reasonable grounds for making the relevant FNP Accounts Representation (together, the **FNP Accounts Opinion Representations**).

Particulars

The FNP Accounts Opinion Representations were implied by:

- (v) *the conduct of FNP in issuing each of the Full-Year Financial Reports and Half-Year Financial Reports and including within those reports statements to the effect that those reports were accurate and had been prepared in compliance with the Corporations Act and the Australian Accounting Standards;*
 - (vi) *the absence of any qualification as to the unreliability of any of FNP's internal systems or controls, in circumstances where:*
 - (A) *the FNP Full-Year Financial Reports and Half-Year Financial Reports were required to give a true and fair view of the financial position and performance of FNP (and its controlled entities);*
 - (B) *FNP was required to disclose to the market any material information which any officer of FNP had, or which reasonably ought to have come into their possession in the course of their duties; and*
 - (C) *the directors' declarations were made in each of the Full-Year Financial Reports and Half-Year Financial Reports.*
15. FNP (through the following signatories) provided the following management representation letters to Deloitte:
- (a) on or about 26 September 2014, FNP provided a management representation letter to Deloitte, signed by Rory Macleod, Managing Director and Sharon Maguire, Group Accounting Manager, as to matters concerning the FY2014 Full-Year Financial Report (**FY14 Management Representation Letter**);
 - (b) on or about 30 September 2015, FNP provided a management representation letter to Deloitte, signed by Rory Macleod, Managing Director and Sharon

Maguire, Business Transformation Manager, as to matters concerning the FY2015 Full-Year Financial Report (**FY15 Management Representation Letter**);

- (c) on or about 31 August 2016, FNP provided a management representation letter to Deloitte, signed by Rory Macleod, Managing Director and Luke Collis, Group GM Commercial Finance, as to matters concerning the FY2016 Full-Year Financial Report (**FY16 Management Representation Letter**);
- (d) on or about 31 August 2017, FNP provided a management representation letter to Deloitte, signed by Rory Macleod, Managing Director and Campbell Nicholas, Chief Financial Officer, as to matters concerning the FY2017 Full-Year Financial Report (**FY17 Management Representation Letter**);
- (e) on or about 30 August 2018, FNP provided a management representation letter to Deloitte, signed by Rory Macleod, Managing Director and Campbell Nicholas, Chief Financial Officer, as to matters concerning the FY2018 Full-Year Financial Report (**FY18 Management Representation Letter**); and
- (f) on or about 29 August 2019, FNP provided a management representation letter to Deloitte, signed by Rory Macleod, Managing Director and Campbell Nicholas, Chief Financial Officer, as to matters concerning the FY2019 Full-Year Financial Report (**FY19 Management Representation Letter**)

(together, the **FNP Full-Year Representation Letters**).

16. The FNP Full-Year Representation Letters:

- (a) were provided for the purpose of Deloitte expressing an opinion as to whether each of FNP's Full-Year Financial Reports gave a true and fair view in accordance with the Australian Accounting Standards and the Corporations Act;
- (b) contained statements that FNP management (represented by the signatories of the relevant letter):
 - i. had fulfilled their responsibilities, as set out in the terms of the relevant Deloitte Retainer, for the preparation of the relevant Full-Year Financial Report in accordance with Australian Accounting Standards

and the Corporations Act; in particular that the Full-Year Financial Report gave a true and fair view;

- ii. had provided Deloitte with:
 - 1. access to all information of which they were aware that was relevant to the preparation of the relevant Full-Year Financial Report such as records, documentation and other matters;
 - 2. additional information that Deloitte had requested from FNP management for the purpose of the relevant audit;
 - 3. unrestricted access to the persons within FNP from whom Deloitte had determined it necessary to obtain audit evidence; and
 - 4. all information required by the Corporations Act and all requested information, explanations and assistance for the purposes of the relevant audit;
- iii. confirmed that all transactions had been recorded in the accounting records and were reflected in the relevant Full-Year Financial Report ;
- iv. were responsible for the design, implementation and maintenance of internal control to prevent and detect fraud and error;
- v. disclosed to Deloitte the results of their assessment of the risk that the relevant Full-Year Financial Report may be materially misstated as a result of fraud;
- vi. confirmed there had been no fraud or suspected fraud affecting FNP involving management, employees who have significant roles in internal control or others where the fraud could have a material effect on the relevant Full-Year Financial Report;
- vii. confirmed there had been no allegations of fraud or suspected fraud affecting FNP involving management, employees who have significant roles in internal control or others where fraud could have a material effect on the relevant Full-Year Financial Report;

- viii. confirmed there had been no instances of non-compliance or suspected non-compliance with laws and regulations whose effects should be considered when preparing the relevant Full-Year Financial Report;
- ix. confirmed significant assumptions used by FNP management in making accounting estimates, including those measured at fair value, are reasonable;
- x. confirmed the effects of uncorrected misstatements (a summary of which items was attached to each respective representation letter in an annexure) were immaterial, individually and in aggregate, to the Full-Year Financial Report as a whole;
- xi. confirmed the selection and application of accounting policies as described in Note 2 in the relevant Full-Year Financial Report were appropriate;
- xii. had communicated to Deloitte all deficiencies in internal control of which they were aware; and
- xiii. there were no share-based payments that had not been disclosed to Deloitte and there was no documentation relating to share-based payments that had been withheld.

17. On or about:

- (a) 26 September 2014, FNP represented that the statements contained in the FY14 Management Representation Letter, including (where applicable) those pleaded in paragraph 16 above, were true;
- (b) 30 September 2015, FNP represented that the statements contained in the FY15 Management Representation Letter, including (where applicable) those pleaded in paragraph 16 above, were true;
- (c) 31 August 2016, FNP represented that the statements contained in the FY16 Management Representation Letter, including (where applicable) those pleaded in paragraph 16 above, were true;
- (d) 31 August 2017, FNP represented that the statements contained in the FY17 Management Representation Letter, including (where applicable) those pleaded in paragraph 16 above, were true;

- (e) 30 August 2018, FNP represented that the statements contained in the FY18 Management Representation Letter, including (where applicable) those pleaded in paragraph 16 above, were true; and
 - (f) 29 August 2019, FNP represented that the statements contained in the FY19 Management Representation Letter, including (where applicable) those pleaded in paragraph 16 above, were true,
- (together, the **Management Representation Letter Representations**)

Particulars

Each Management Representation Letter Representation was conveyed expressly and/or impliedly by the following:

- (i) the express written statement, in the relevant FNP Full-Year Representation Letter, by the persons who signed the letter that the representation letter was provided in connection with Deloitte's audit and for the purpose of Deloitte expressing an opinion as to whether the Full-Year Financial Report gave a true and fair view in accordance with the Australian Accounting Standards and the Corporations Act;*
- (ii) the express written statement, in the relevant FNP Full-Year Representation Letter, by the persons who signed the letter, that "confirmed" the statements given in the numbered paragraphs within the letter;*
- (iii) the context in which the FNP Full-Year Representation Letter was sought by Deloitte and given by those persons who signed it; and*
- (iv) the absence of any qualification as to the truth or accuracy of the statements contained in the FNP Full-Year Representation Letter.*

18. Alternatively, if and to the extent that one or more of the Management Representation Letter Representations was a representation of opinion only, then FNP in providing the FNP Full-Year Representation Letters to Deloitte impliedly represented that it had reasonable grounds for making the relevant Management Representation Letter

Representation (together, the **Management Representation Letter Opinion Representations**).

Particulars

The Management Representation Letter Opinion Representations were implied by the conduct of the signatories of the FNP Full-Year Representation Letters in issuing each of the FNP Full-Year Representation Letters, containing the express statements within those letters, including the express statements referred to in the particulars subjoined to the preceding paragraph.

19. FNP (through the following signatories) provided the following further management representation letters to Deloitte:
- (a) on or about 27 February 2015, FNP provided a management representation letter to Deloitte, signed by Rory Macleod, Managing Director and Sharon Maguire, Group Financial Controller, as to matters concerning the 1H2015 Half-Year Financial Report;
 - (b) on or about 29 February 2016, FNP provided a management representation letter to Deloitte, signed by Rory Macleod, Managing Director and Cassie Ruiz, Group Financial Controller, as to matters concerning the 1H2016 Half-Year Financial Report;
 - (c) on or about 28 February 2017, FNP provided a management representation letter to Deloitte, signed by Rory Macleod, Managing Director and CEO and Campbell Nicholas, Chief Financial Officer, as to matters concerning the 1H2017 Half-Year Financial Report;
 - (d) on or about 27 February 2018, FNP provided a management representation letter to Deloitte, signed by Rory Macleod, Managing Director and Campbell Nicholas, Chief Financial Officer, as to matters concerning the 1H2018 Half-Year Financial Report;
 - (e) on or about 28 February 2019, FNP provided a management representation letter to Deloitte, signed by Rory Macleod, Managing Director and Campbell Nicholas, Chief Financial Officer, as to matters concerning the 1H2019 Half-Year Financial Report; and

- (f) on or about 27 February 2020, FNP provided a management representation letter to Deloitte, signed by Rory Macleod, Managing Director and Campbell Nicholas, Chief Financial Officer, as to matters concerning the 1H2020 Half-Year Financial Report,

(together, the **FNP Half-Year Representation Letters**).

20. The FNP Half-Year Representation Letters:

- (a) were provided for the purpose of Deloitte expressing a conclusion as to whether Deloitte had become aware of any matter in the course of the relevant review that make it believe that each of FNP's Half-Year Financial Reports were not in accordance with the Corporations Act;
- (b) contained an acknowledgment of FNP's management's (represented by the signatories of the relevant letter) responsibility for ensuring that each of the Half-Year Financial Reports were in accordance with the Corporations Act, including:
 - i. giving a true and fair view of FNP's financial position as at the relevant reporting date and of its performance for the half-year ended on that date; and
 - ii. complying with the Australian Accounting Standards and the Corporations Regulations;
- (c) contained statements that FNP's management (represented by the signatories of the relevant letter):
 - i. confirmed that the FNP Half-Year Financial Reports were prepared and presented in accordance with the Corporations Act and was free of material misstatements, including omissions; and
 - ii. confirmed, to the best of FNP's management's (represented by the signatories of the relevant letter) knowledge and belief, the following representations made to Deloitte during its reviews of FNP's Half-Year Financial Reports:
 - A. that FNP's management were responsible for the design and implementation of internal control to prevent and detect fraud and error;

- B. that FNP's management believed the effect of those uncorrected misstatements, aggregated by Deloitte during its review and included in Appendix A to the relevant letter, were immaterial, both individually and in the aggregate, to the Half-Year Financial Report taken as a whole;
- C. that there had been no fraud or suspected fraud known to FNP's management that may have affected FNP;
- D. that FNP's management had disclosed to Deloitte the results of its assessment of the risk that the Half-Year Financial Report may be materially misstated as a result of fraud;
- E. that there had been no events subsequent to period end through to the date of the letter that would require adjustment to, or disclosure in, the Half-Year Financial Report;
- F. that FNP's management had made available to Deloitte:
 - 1. all financial records and related data, other information, explanations and assistance necessary for the conduct of the review; and
 - 2. minutes of all meetings of Board of Directors (and from 1H2019, of directors and committees of directors), and where minutes had not been made for recent meetings, a summary of decisions taken at those meetings has been made available to Deloitte;
- G. that there had been no instances of non-compliance with laws and regulations involving management or employees who had a significant role in the internal control structure;
- H. that there had been no violations or possible violations of laws or regulations the effects of which should be considered for disclosure in the Half-Year Financial Report or as a basis for recording an expense;

- I. that FNP has complied with all aspects of contractual agreements that would have a material effect on the Half-Year Financial Report in the event of non-compliance;
- J. that FNP's management were responsible for an adequate internal control structure to facilitate the preparation of a reliable Half-Year Financial Report, that adequate financial records had been maintained, and that there were no material transactions that had not been recorded properly in the accounting records underlying the Half-Year Financial Report;
- K. that FNP's management had considered the requirements of Accounting Standard AASB 136 *Impairment of Assets* when assessing the impairment of assets and in ensuring that no assets were stated in excess of their recoverable amount, and had communicated to Deloitte all indicators of impairment and where those existed, FNP's management had conducted appropriate impairment testing on the relevant asset(s);
- L. that various matters had been properly recorded and, when appropriate, adequately disclosed in the Half-Year Financial Report, including share options, warrants, conversions or other requirements;
- M. that where assets and liabilities were recorded at their fair value, the value attributed to those assets and liabilities was, in the opinion of the Board of Directors, the fair value, and that FNP's management were responsible for the reasonableness of any significant assumptions underlying the valuation, including consideration of whether they appropriately reflected management's intent and ability to carry out specific courses of action;
- N. that there were no shared based payments that had not been disclosed to Deloitte and there was no documentation relating to share based payments that had been withheld; and
- O. in relation to 1H2020:

1. that all additions to capitalised work in progress had been accounted for in accordance with FNP's policy and AASB 116 "*Property, Plant and Equipment*", and that those costs included all expenditure directly attributable to bringing the asset to its working condition intended by management; and
 2. that all completed assets that were operating in the manner intended by management had been transferred to Plant and Equipment and that they had been depreciated in accordance with FNP's accounting policy for depreciation.
21. On or about the dates of each of FNP's Half-Year Representation Letters, FNP represented that the statements contained in the relevant Half-Year Representation Letter, including (where applicable) those pleaded in paragraph 20 above:
- (a) were true;
 - (b) alternatively, were statements of opinion for which FNP had reasonable grounds;
 - (c) alternatively, were statements as to knowledge and belief that were informed by all reasonable inquiries and were beliefs that were reasonably held.

(Half-Year Management Representation Letter Representations).

Particulars

Each Half-Year Management Representation Letter Representation was conveyed expressly and/or impliedly by the following:

- (i) *The express written statement, in the relevant FNP Half-Year Representation Letter, by the persons who signed the letter that the representation letter was provided in connection with Deloitte's half-year review and for the purpose of Deloitte expressing a conclusion as to whether Deloitte had become aware of any matter in the course of the relevant review that make it believe that the Half-Year Financial Report was not in accordance with the Corporations Act;*
- (ii) *the express written statement, in the relevant FNP Half-Year Representation Letter, by the persons who signed the letter, that*

“confirmed” the statements given in the numbered paragraphs within the letter;

(iii) the context in which the FNP Half-Year Representation Letter was sought by Deloitte and given by those persons who signed it; and

(iv) the absence of any qualification as to the truth or accuracy of the statements contained in the FNP Half-Year Representation Letter.

22. Other than in the circumstances pleaded in paragraph 54 of the CSOC in respect of the FNP Accounts Representations based on the 29 May 2020 Trading Update, at no time during or prior to the Claim Period did FNP withdraw, or qualify, the FNP Accounts Representations, the FNP Accounts Opinion Representations, the Management Representation Letter Representations, the Management Representation Letter Opinion Representations and/or the Half-Year Management Representation Letter Representations.

F. FNP’S MISLEADING OR DECEPTIVE CONDUCT

23. By making and/or failing to correct or qualify each of the FNP Accounts Representations, the FNP Accounts Opinion Representations, the Management Representation Letter Representations, the Management Representation Letter Opinion Representations and/or the Half-Year Management Representation Letter Representations, FNP engaged in conduct:

- i. in relation to a financial product or a financial service within the meaning of s 1041H of the Corporations Act;
- ii. in trade or commerce in relation to financial services within the meaning of s 12DA of the Corporations Act; and/or
- iii. in trade or commerce within the meaning of s 18 of the ACL.

24. By reason of the matters pleaded in paragraph 79 of the CSOC (which Deloitte repeats and relies on for the purposes of this claim on third party notice only), FNP engaged in conduct which was misleading or deceptive, or likely to mislead or deceive by:

- i. making any or all of the FNP Accounts Representations, the FNP Accounts Opinion Representations, the Management Representation Letter Representations, the Management Representation Letter Opinion Representations and/or the Half-Year Management Representation Letter Representations; and
- ii. failing to correct or qualify any or all of the FNP Accounts Representations, the FNP Accounts Opinion Representations, the Management Representation Letter Representations, the Management Representation Letter Opinion Representations and/or the Half-Year Management Representation Letter Representations.

Particulars

By reason of the matters pleaded in paragraph 79 of the CSOC:

- A. *each of the FNP Accounts Representations was misleading or deceptive because the relevant Full-Year Financial Reports and Half-Year Financial Reports had not been prepared in accordance with the Australian Accounting Standards and/or the relevant Full-Year Financial Reports and Half-Year Financial Report did not give a true and fair view of the financial performance or the financial position and performance of FNP at the relevant reporting date;*
- B. *in the premises set out in paragraph 79 of the CSOC and subparagraph (A) immediately above, FNP did not have reasonable grounds upon which to make the FNP Accounts Opinion Representations.*
- C. *Each of the FNP Full-Year Representation Letters and FNP Half-Year Representation Letters was misleading or deceptive because:*
 - i. *the true state of affairs was other than as presented in the FNP Full-Year Representation Letters and FNP Half-Year Representation Letters;*

- ii. *FNP had not fulfilled its responsibilities, as set out in the terms of the relevant audit and review engagements, for the preparation of Full-Year Financial Reports and Half-Year Financial Reports in accordance with Australian Accounting Standards and the Corporations Act and Corporations Regulations;*
- iii. *significant assumptions used by FNP management in making accounting estimates, including those measured at fair value, were not reasonable;*
- iv. *the effects of uncorrected misstatements were material, individually and in aggregate, to the Full-Year Financial Reports and Half-Year Financial Reports as a whole; and*
- v. *there were share based payments that had not been disclosed to Deloitte and there was documentation relating to share based payments that had been withheld;*

D. in the premises of the matters set out in paragraph 79 of the CSOC and subparagraph (C) immediately above, FNP did not have reasonable grounds upon which to make the Management Representation Letter Representations and the Management Representation Letter Opinion Representations; and

E. in the premises of the matters set out in paragraph 79 of the CSOC and subparagraph (C) above, the Half-Year Management Representation Letter Representations were false.

25. By reason of the matters pleaded in paragraphs 23 and 24 above, FNP contravened:

- i. s 1041H of the Corporations Act;
- ii. s 12DA of the ASIC Act; and
- iii. s 18 of the ACL,

(FNP's Misleading Conduct Contraventions as against Deloitte).

G. RELIANCE BY DELOITTE

26. If, which is denied on the terms set out in the defence, Deloitte made any or all of the Deloitte Representations as alleged in the CSOC, Deloitte did so in reliance on the purported truth, accuracy and completeness of each and/or all of the FNP Accounts Representations, FNP Accounts Opinion Representations, the Management Representation Letter Representations, the Management Representation Letter Opinion Representations and/or the Half-Year Management Representation Letter Representations.

Particulars

The CSOC uses the Deloitte Representations as a defined term (see paragraph 88 of the CSOC) to refer to the Deloitte Half-Year Representations and the Deloitte Full-Year Audit Representations, each of which, in turn, are defined terms used to refer to the representations alleged at paragraph 48 and paragraph 50 of the CSOC respectively.

27. But for the FNP Accounts Representations, the Management Representation Letter Representations, the Management Representation Letter Opinion Representations and/or the Half-Year Management Representation Letter Representations:
- i. Deloitte would not have made the Deloitte Representations (if, which is denied on the terms set out in the defence, they were made); and
 - ii. Deloitte would not have been exposed to:
 - A. any liability to compensate the Plaintiffs and Group Members in the manner alleged in the CSOC; and/or
 - B. incurring the costs of defending the Plaintiffs and Group Members' claims against them.

H. BREACH OF RETAINER

28. In the premises of paragraph 79 of the CSOC (which Deloitte repeats and relies on for the purposes of this claim on third party notice only), FNP:
- i. did not prepare and/or did not exercise reasonable care, skill and diligence in preparing Full-Year Financial Reports and Half-Year Financial Reports that gave a true and fair view of FNP's financial position and performance in accordance with the Corporations Act;

- ii. did not prepare Full-Year Financial Reports and Half-Year Financial Reports that were free from material misstatement, whether due to fraud or error; and/or
- iii. did not provide Deloitte with accurate and complete information and all information that was relevant to the services to be provided under the Deloitte Retainers.

Particulars

Each of the matters pleaded at paragraph 79 of the CSOC (which Deloitte repeats and relies on for the purposes of this claim on third party notice only), was, relevantly:

- (a) a matter that ought to have been disclosed to Deloitte pursuant to the terms of (as applicable) the Deloitte Retainers;*
- (b) a matter of the type which FNP had represented had been disclosed to Deloitte in the FNP Full-Year Representation Letters and FNP Half-Year Representation Letters;*
- (c) a matter of the type that a reasonable auditor in the position of Deloitte would have expected would have been, in the circumstances, disclosed; and/or*
- (d) a matter of the type that ought to have been disclosed to Deloitte in the relevant directors' reports.*

29. By reason of the matters pleaded in paragraph 28 above, FNP breached the Deloitte Retainers (**Retainer Breach**).

30. But for the Retainer Breach,

- i. Deloitte would not have made the Deloitte Representations; and
- ii. Deloitte would not have been exposed to:
 - A. any liability to compensate the Plaintiffs and Group Members in the manner alleged in the CSOC; and/or
 - B. incurring the costs of defending the Plaintiffs and Group Members' claims against them.

I. LOSS AND DAMAGE

31. By reason of the matters pleaded in paragraphs 23 to 27 and 28 to 30 above:

(a) Deloitte has suffered loss;

Particulars

Deloitte has incurred and continues to incur costs and expenses in defending the CSOC, a substantial portion of which will be incurred even if the proceedings against them are dismissed (whether in whole or in part).

(b) if, and to the extent FNP is found liable for any loss or damage (which is denied) alleged in the CSOC, then Deloitte will suffer loss.

Particulars

Deloitte will suffer loss and damage to the extent of any liability for damages and/or costs that it is found to have in the proceeding.

32. Deloitte is entitled to recover the amount of their loss and damage suffered by reason of:

(a) FNP's Misleading Conduct Contraventions as against Deloitte pursuant to s 1041I of the Corporations Act, s 12GF of the ASIC Act and/or s 236 of the ACL; and / or

(b) the Retainer Breach.

J. CLAIMS FOR CONTRIBUTION AND INDEMNITY IN RESPECT OF NON-APPORTIONABLE CLAIMS

33. Further or alternatively, if Deloitte contravened ss 1041H and/or 1041E the Corporations Act, s 12DA of the ASIC Act and/or s 18 of the ACL as alleged by the Plaintiffs in the CSOC (which is denied), and if those contraventions caused the Plaintiffs' and Group Members' Loss and Damage as alleged in the CSOC (which is also denied), then each of:

i. the FNP Contraventions;

ii. FNP's Misleading Conduct Contraventions as against Deloitte; and

iii. the Retainer Breach,

caused and/or contributed to the Plaintiffs' and Group Members' Loss and Damage, and FNP are liable to the Plaintiffs and Group Members for that same loss and damage

pursuant to s 1041I and/or 1325 of the Corporations Act, ss 12GF and/or 12GM of the ASIC Act and/or s 236 of the ACL.

34. By reason of the matters pleaded in paragraph 33 above, if Deloitte is liable to the Plaintiffs and Group Members for the Plaintiffs' and Group Members' Loss and Damage as alleged in the CSOC (which is denied), then FNP is also liable to:
- (a) the Plaintiffs and Group Members for that same loss and damage; and
 - (b) Deloitte in respect of any non-apportionable claim made against it in the CSOC:
 - i. is entitled to contribution and/or indemnity from FNP pursuant to Part IV of the *Wrongs Act 1958* (Vic) on the basis that it is just and equitable that FNP make contribution and/or give such an indemnity; further or alternatively
 - ii. is entitled to equitable contribution from FNP.

Dated: 12 April 2022

W A HARRIS

K A LOXLEY



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Corrs Chambers Westgarth
Solicitors for Deloitte